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Texas Commission on Environmental Quality

Protecting Texas by Reducing and Preventing Pollution

December 3, 2010

Mr. William P. Dornsife, P.E.
Executive Vice President
Licensing and Regulatory Affairs
Waste Control Specialists, LLC
5430 LBJ Freeway, Suite 1700
Dallas, Texas 75240

Subject: Texas Commission on Environmental Quality's (TCEQ's) Response to Waste Control Specialists LLC's (WCS's) Letter Requesting Concurrence that Certain Construction Preparatory Activities May Commence under Radioactive Material License RO4100 Prior to Receipt of Written Approval Required by License Condition 63

Dear Mr. Dornsife:

Thank you for your letter dated November 24, 2010, which was officially received by the Radioactive Materials Division on November 29, 2010. You have requested that TCEQ allow WCS to engage in certain activities associated with the Low-Level Radioactive Waste Disposal Facility (land disposal facility). The License and TCEQ rules are clear, "construction may not commence without prior written approval of the Executive Director." See LC 63, LC 11.D, and 30 Texas Administrative Code (TAC) §336.702. The license term construction is not modified by the adjective "major" in the applicable license condition. LC 63 has five elements that must be satisfied prior to written approval for the commencement of construction by the Executive Director.

The Executive Director is partially denying your request for concurrence that certain construction preparatory activities may commence under radioactive material license No. RO4100 prior to receipt of written approval required by LC 63. Basically, activities occurring outside the perimeter of the land disposal facility are acceptable at this time. However, activities within the perimeter of the planned land disposal facility are not acceptable. The Executive Director calls your attention to the definition of excavation in LC 11.L and the term "clearing of land" as another guideline for activities that are not acceptable prior to his approval of the commencement of major construction. At all times, the integrity of the Buffer Zone shall be maintained.

The Executive Director has reviewed the ten (10) items discussed in your letter and made the following determinations:

Mr. William P. Dornsife, P.E.

Page 2

December 3, 2010

Installation of Drainage, Erosion, and Other Environmental Mitigation Measures

Items (1) and (2) are acceptable activities as long as they occur outside the perimeter of the land disposal facility. The following items: Item (3) stormwater drainage work Item; (4) installation of ditches and piping; and Item (5) grading for the receiving area are not acceptable because they are activities within the perimeter of the planned land disposal facility and qualify as commencement of major construction under LC 11.D, LC 63 and 30 TAC §336.702.

Construction of Temporary Roads and Borrow Areas

Item (6) Installation of haul roads is acceptable up to the perimeter of the planned land disposal facility. Item (7) Installation of temporary road system, which involves clearing of land, is not acceptable because it is an activity within the perimeter of the planned land disposal facility and would qualify as commencement of major construction under LC 11.D, LC 63 and 30 TAC §336.702.

Erection of Support Facilities

Item (8) Installation of Potable and Non-potable water distribution piping is not acceptable because it is an activity within the perimeter of the planned land disposal facility and would qualify as commencement of major construction under LC 11.D, LC 63 and 30 TAC §336.702.

Item (9) Construction of the Compact Waste Disposal Facility (CWF) sedimentation pond and Item (10) Construction of the Federal Facility Waste Disposal Facility (FWF) sedimentation ponds are not acceptable because they are activities within the perimeter of the planned land disposal facility and qualify as commencement of major construction under LC 11.D, LC 63 and 30 TAC §336.702. The design of the sedimentation ponds are part of the pending January 12, 2010 amendment application. The revisions of the size and location of sediment ponds have not been approved.

The Executive Director has considered your arguments and analogies from proposed rulemaking and other regulatory frameworks regarding commencement of construction of other facilities regulated and licensed by the United States Nuclear Regulatory Commission (NRC.) However, these analogies are not applicable to this activity which is licensed by the State of Texas, which is an Agreement State. NRC does not have regulatory authority or oversight over this facility. The only applicable NRC regulations series is Title 10 Code of Federal Regulations (CFR) Part 61, not 10 CFR Part 51. The Executive Director has reviewed your request and found it to be inconsistent with both license condition 63 and the definition of "commencement of major construction" in Title 30 TAC §336.702(4). Since 2003, the NRC has repeatedly upheld 30 TAC §336.702(4) as compatible with 10 CFR Part 61 definitions. The NRC also recently reviewed the RO4100 license, and did not find any inconsistencies or federal compatibility issues.

This week, as part of the Executive Director's review of your request, we discussed your letter with the NRC. TCEQ staff confirmed that definitions in 30 TAC §336.702 are required to be compatible with the federal definition in 10 CFR Part 61, not Part 51, 40 or other federal sections. Although 10 CFR Part 51, 40, or other federal sections may include discussion referencing the term construction relating to other facilities, such as nuclear power plants, only

Mr. William P. Dornsife, P.E.
Page 3
December 3, 2010

10 CFR Part 61 specifically regulates the "Licensing Requirements for Land Disposal of Radioactive Waste." The TCEQ rules are the final authority regarding low-level radioactive waste disposal in Texas. TCEQ and NRC Attorneys and staff had telephone and electronic mail exchanges on the Part 61 definition of "commencement of construction" as well as other regulations such as 10 CFR Part 51 and proposed rules under Part 40. There is no case law or guidance on the application of the Part 61 federal definition of commencement of construction due to the fact that NRC has never licensed a low-level radioactive waste disposal facility under 10 CFR Part 61. In fact, only one low-level radioactive waste disposal facility has ever been constructed under the 10 CFR Part 61 compatible requirements, which was under the regulatory authority of an Agreement State, not the NRC.

In conclusion, although some of the construction activities outside of the planned disposal facility do not need regulatory concurrence, the other activities you have proposed are subject to written authorization for commencement of construction by the above-referenced rule and license condition.

Please contact me at (512) 239-5604 or by email at dclarke@tceq.state.tx.us if you have any questions or if you need additional information.

Sincerely,

A handwritten signature in dark ink, appearing to read "Devane Clarke", with a stylized flourish at the end.

Devane Clarke, Manager
Radioactive Material Licensing
Texas Commission on Environmental Quality

DC/nlc

Mr. William P. Dornsife, P.E.

Page 4

December 3, 2010

bcc: Susan Jablonski, RMD
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